BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CAROL EBERL	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,011,105
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the March 28, 2005 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on August 19, 2005 in Wichita, Kansas.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. John C. Nodgaard, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument claimant's counsel requested leave to file a brief out of time as claimant was not copied on respondent's brief to the Board. Respondent's counsel had no objection and that brief has now been received and reviewed by the Board as part of the record. In addition, the parties agreed that to the extent claimant may be entitled to a work disability, neither party disputes the 27 percent task loss found by the ALJ.

ISSUES

The ALJ considered the opinions of Drs. Stein, Prostic and Mills and opined that claimant suffered from a 7.5 percent permanent impairment of function to the whole body. She also found that after claimant's termination from respondent's employ, a termination that the ALJ concluded was not "for cause", the claimant made a good faith effort to find post-injury work. Accordingly, she assigned claimant a 63.5 percent work disability based on a 100 percent wage loss and a 27 percent task loss (an average of all three doctors task loss opinions).[1]

The respondent requests review of the nature and extent of claimant's disability, both in terms of the functional impairment and claimant's entitlement to a work disability. In particular, respondent argues that claimant returned to her regular job duties following her injury, working until August 2004 when she was terminated for poor job performance and inconsistent attendance. Respondent maintains that its decision to terminate her employment had no relationship to her work-related injury. And that its decision to fire her does not give rise to a work disability under K.S.A. 44-510e(a). Had claimant made a genuine effort to retain her employment with respondent, she would still be employed and earning a comparable wage. Alternatively, respondent argues that if claimant is entitled to a work disability finding, the Board should closely scrutinize claimant's post-termination job search as respondent believes claimant's efforts have been insufficient. Respondent requests that the ALJ's Award be modified to deny claimant work disability or, at a minimum, modify the work disability finding to impute a wage based on an hourly figure of $7.50 per hour. Finally, respondent believes claimant's functional impairment should have been 5 percent as assessed by Dr. Mills.

Respondent also contends claimant was not disabled from performing her job for a period of one week and therefore is not entitled to any permanency as a result of her injury. Although not cited by respondent, presumably this contention stems from the Court of Appeals opinion in *Boucher*.[2]

Claimant contends the ALJ's Award is appropriate and should be affirmed. Claimant concedes her job performance may have been less than optimal, but that her work-related injury left her with restrictions that put her at a disadvantage in finding appropriate and comparable employment following her injury and subsequent termination from respondent's employ. Claimant has unsuccessfully sought subsequent employment

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[1] The body of the Award reflects a 7.5 percent functional impairment and a 63.5 percent work disability. At oral argument the parties agreed that the final section of the Award should have mirrored the ALJ's findings made in the body of the document rather than the higher figures listed on page 5 of the Award.

[2] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

and in her view, has sustained a 100 percent wage loss. Claimant also contends that her claim for permanency is not barred by the holding in *Boucher* because her accident occurred in 2003.

The issues to be addressed are as follows:

1. The extent of claimant's functional impairment;

2. Whether claimant exhibited good faith in retaining her employment with respondent; and if so,

3. Whether claimant made a good faith effort to find appropriate employment following her termination from respondent's employ; and

4. Whether claimant was disabled for a week as required by K.S.A. 44-501(c)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured on May 7, 2003 when she tripped and fell on some steps. There is no dispute about the compensability of claimant's injury. Claimant's initial complaints were of low back and left hip pain. In June 2003, she had an MRI which revealed a small annular tear at L5-S1. Claimant was treated by Dr. Mark Dobyns who ultimately released her to return to work in September 2003 without restrictions.

The ALJ's Award succinctly outlined the evidence bearing on claimant's physical condition and each of the physician's opinions as to claimant's resulting functional impairment and task loss, using Doug Lindahl's task analysis. Those facts will not be repeated, but are merely adopted and incorporated herein.

The ALJ considered the functional impairment opinions offered by Dr. Paul S. Stein (who assessed 0 to 5 percent), Dr. Philip R. Mills (who assessed 5 percent) and Dr. Edward J. Prostic (who assessed 10 percent to the body as a whole) according to the AMA *Guides*[3], and concluded claimant sustained a 7.5 percent permanent impairment to the whole body. The Board has reviewed the record and concludes the ALJ's finding should be affirmed. Given claimant's ongoing complaints of subjective pain and the nature of her injury, the 7.5 percent assessed by the ALJ is reasonable.

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

The more problematic issue stems from respondent's decision to terminate claimant's employment in August 2004, and whether that decision entitles claimant to a work disability under K.S.A. 44-510e. When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

The Board has also held that workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.

Here, the ALJ concluded claimant had not been terminated for cause, although she expressly concluded claimant was terminated for unsatisfactory job performance. She went on to find that "[c]laimant attempted to correct and improve her job performance" and as such, "[h]er conduct does not constitute a bad faith effort to retain her accommodated employment."[7] The Board has considered the ALJ's findings and disagrees.

Claimant was hired in December 2001 to serve as a case reader for the Social and Rehabilitation Services agency for the State of Kansas. This job is sedentary in nature and required claimant to sit at a desk and pick up and review documents which reflect abuse reports. She was then to input the information into a computer using a variety of programs. She was also required to sign in and out for work each day. Of particular importance was her job of entering information into the State's abuse registry. Claimant had very little prior experience with computers.

By her first evaluation after 6 months of employment, claimant had not exhibited an ability to perform many of the essential skills necessary for the job. Moreover, she had accrued 45.75 hours of leave without pay during this first evaluation period.[8] Thus, her absences were complicating her ability to grasp the tasks necessary for her job.

In many areas her supervisor, Carmetta Grayson, thought claimant was putting forth the effort to perform her job, but in others, claimant was not performing well. So claimant's probation was extended 6 months. In her December 2002 evaluation, claimant again was making serious and significant mistakes and failing to input critical information into the computer. Her job output was far less than that demonstrated by her co-workers. She also had difficulty remembering to sign in and out as all employees are required to do. Although Ms. Grayson believed claimant's performance was problematic, and that ultimately her

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[6] *Id.* at 320.

[7] ALJ Award (Mar. 28, 2005) at 5.

[8] Grayson Depo. at 22.

mistakes were placing the children of Kansas "at risk"[9] she recommended claimant be placed on permanent status. Ms. Grayson testified that claimant told her she was feeling better and in fact, claimant's attendance had improved.

At her next evaluation, Ms. Grayson testified claimant was still undependable and exhibiting unsatisfactory job performance with respect to her work tasks. This evaluation took place after claimant's injury, but encompassed a period before and after her accident. Ms. Grayson's written evaluation indicates claimant's dependability was an ongoing issue. She was given an "unsatisfactory" job evaluation and placed on a work plan. This work plan required claimant to comply with certain conditions, including providing a physician's excuse for absences due to her injury, and to request assistance to complete her job tasks, if needed.

Claimant was evaluated again for the period December 2, 2003 to March 29, 2004. During this time she used 41.5 hours of leave, over and above the time off for medical and therapy appointments for her injury. Her work output during this time was significantly less than that of her co-workers. And she would routinely overlook new work as it came in, apparently leaving it for her co-workers. Claimant repeatedly overslept, arrived at work late and left early. According to Ms. Grayson, claimant would call in and explain that she was unable to come to work as she was having car trouble or needed to attend a funeral. However, claimant later produced a doctor's note that seemed to indicate she was unable to work on those given days as she was experiencing back pain.

Following a third unsatisfactory evaluation for the period March 29, to June 29, 2004, Ms. Grayson recommended that claimant's employment be terminated. According to Ms. Grayson, claimant never came to her and explained that she was unable to perform her job due to her injury or the medications she was taking. Other than allowing claimant to adjust her work hours to accommodate her medical appointments, no other accommodation was made to claimant. In contrast, claimant maintains she was terminated because of her injury and its impact on her ability to perform her job.

In July 2004, claimant was sent a letter indicating the State's intention to terminate her employment. Claimant appealed her last performance evaluation which led to the termination of her employment. The agency's internal committee heard claimant's appeal and confirmed that her employment should be terminated. Once claimant was officially fired she appealed her termination to the Civil Service Board. The Civil Service Board upheld the committee's decision and claimant's employment was terminated.

During the 2 months between her termination and the regular hearing, claimant sought employment almost exclusively within state agencies as she wants to retain the fringe benefits available to state employees. She has submitted 50 applications, via a

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[9] *Id.* at 33-34.

computer from her home. There are a smaller number of private employers with whom she has sought employment. However, she received no job offers as of the regular hearing.

Respondent stridently argues that claimant returned to her pre-injury job performing, albeit poorly, all of her pre-injury job tasks. Respondent further argues that her subsequent termination was due to her poor job performance rather than her work-related injury. Thus, under *Foulk*,[10] *Copeland*,[11] and *Watkins*,[12] respondent contends claimant is not entitled to any work disability beyond her functional impairment. Put simply, claimant failed to exhibit a good faith effort to retain her employment with respondent. Thus, the wage she would have earned in her position with respondent should be imputed to her thereby limiting her recovery to the value of her functional impairment.

Claimant just as stridently argues that she is entitled to a work disability finding as she was terminated from her position with respondent and is, due to her injury, at a disadvantage in the workplace. She is unable to access some of her past job tasks due to her injury and has been unable, in spite of her efforts, to find employment since leaving respondent's employ. Thus, under the terms of K.S.A. 44-510e(a), claimant believes she is entitled to the 63.5 percent work disability found by the ALJ, a figure which reflects her 100 percent wage loss.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[13] The Board has considered the record as a whole along with the parties' arguments and finds the ALJ's conclusions with respect to claimant's termination and her entitlement to work disability should be reversed. The Board finds, under the rationale of *Copeland*[14] and *Perez*,[15] that claimant failed to exhibit a good faith effort to retain her employment with respondent. This finding is based upon the fact that claimant repeatedly failed to sign in and out as she was required, an act that requires no special training or experience. She also had an ongoing problem with unexcused absences, both before and after her compensable injury. Independent of any medical appointments and her apparent inability to grasp the computer skills as well as the need for care and attention to detail necessary to her job, claimant had a significant problem with willful absences and improper conduct. This situation continued almost from the beginning

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[10] *Foulk*, 20 Kan. App. 2d 277.

[11] *Copeland*, 24 Kan. App. 2d 306.

[12] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

[13] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[14] *Copeland*, 24 Kan. App. 2d 306.

[15] *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

of her employment with respondent although her supervisor admits that for a period before her accident it had improved somewhat, enough so that it warranted her status to change from probation to permanent. She also demonstrated an unwillingness to comply with her employer's requirement that she be accountable for her whereabouts, signing in and out as she arrived and left for work.

Based upon its review of the record, the Board concludes claimant's termination was not due to her *inability* to perform the job. Rather, her termination was, based upon the evidence in the record, due to her *purposeful lack of compliance, tardiness and unexcused absences* as well as her insufficient job performance. In sum, the Board is not persuaded that claimant made a sufficient good faith effort to retain her employment with respondent. Accordingly, the Board shall impute the wage she was earning while in respondent's employ, which leaves her with no wage loss and no entitlement to a work disability thus leaving her with a 7.5 permanent partial impairment to the body as a whole.

In making this determination, the Board notes that although it has considered the letters from claimant's co-workers that were offered into evidence during Ms. Grayson's deposition they are not probative and therefore are given no weight.[16] The Board is overruling claimant's hearsay objection to those documents.

The Board further notes that respondent also argues that claimant was not disabled from working for a week as required by K.S.A. 44-501(c). This argument stems from the Appeals Court opinion in *Boucher*.[17] However, respondent's argument is misplaced.

Effective April 4, 1996, K.S.A. 44-501 was amended to eliminate the requirement that an employee be disabled for a period of at least one week from earning full wages before an employer is liable for permanency benefits.[18] Thus, *Boucher* is inapplicable. In any event, this argument was not presented to the ALJ and such arguments will not be considered for the first time on appeal.

All other findings and conclusions of the ALJ's are hereby affirmed to the extent they are not modified herein.

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[16] Grayson Depo., Exs. 16-18.

[17] *Boucher*, 21 Kan. App. 2d 977.

[18] *Matney v. Matney Chiropractic Clinic, P.A.*, 268 Kan. 336, 995 P.2d 871 (2000).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 28, 2005, is affirmed in part and reversed in part as follows:

The claimant is entitled to 31.13 weeks of permanent partial disability compensation at the rate of $262.95 per week or $8,185.63 for a 7.5 percent functional disability, making a total award of $8,185.63, all of which is due and owing less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
John C. Nodgaard, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director